16.152 (B) (1)

IN THE HIGH COURT OF JUDICATURE AT BILASPUR
(CHHATTISGARH) Single Bench

CIVIL REVISION No. 01 /2006

PETITIONERS
Defendants

1. Sunder Bai W/o Champalal Jain aged about 60 years,
2. Deepchand aged about 45 yeas S/o Champalal Jain
3a. Smt. Santosh Bansali aged about 37 years W/o Todarmal Bansali,
3b Amit Bansali aged about 14 years S/o Todarmal Bansali
3c Mukesh Bansali aged about 10 S/o Todarmal Bansali
3d Sumit Bansali aged about 8 years S/oTodarmal Bansali,
4. Bhagchand aged about 35 years S/ Campamal Jain
5. Lunkaran aged about 30 years S/o Champalal Jain
6. Santosh aged about 27 years S/o Champalal Jain

All R/o Village DoundiLohara, Tahsil Dondilohara, Distt. Durg.

7. Smt. Dhelabai aged about 36 years W/o Mahavir Sancheti R/o Sanichari Bazar, Durg.
8. Smt. NirmalBai, aged about 32 years W/o Narendra Bardiya, R/o Sadar Bazar, Distt. Dhamtari

o

P.R. No. 12/06 Presented by Shri Jayram Kaneda dated 27/1/06

VERSUS

RESPONDENTS
Plaintiff

1. Jagdev Singh , aged about 60 years, S/o Raghunath Singh Thakur, R/o Dondilohara, Distt. Durg.

2. The State of Chhattisgarh. through Collector, Durg

REVISION PETITION UNDER SECTION 115 OF CODE OF CIVIL PROCEDURE 1908

A.F.R. (48)

HIGH COURT OF CHHATTISGARH AT BILASPUR

Civil Revision No. 01/2006

Sunder Bai and Others

Vs.

Jagdev Singh and another

Single Bench: Hon'ble Shri Dilip Raosaheb Deshmukh, J.

Post for Order: 19 .12.2006

Sd/-
Dilip Raosaheb Deshmukh
Judge

19 .12.2006

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A.F.R.

HIGH COURT OF CHHATTISGARH AT BILASPUR

Before: Hon'ble Shri Justice Dilip Raosaheb Deshmukh

Civil Revision No.01/2006

Sunder Bai and Others

Vs.

Jagdev Singh and another

Shri Parag Kotecha, learned Counsel with Shri Anand Shukla, Counsel for the petitioners/defendants.
Ms. Puja Shrivastava, learned counsel for the respondent No.1/plaintiff.

O R D E R

(Delivered on this 19th day of December 2006)

This Civil Revision is directed against the order dated 30-08-2005 passed by the Additional District Judge, Balod, District-Durg in Miscellaneous Civil Appeal No.10/2001 whereby the order of rejection of plaintiff's application dated 11-09-2001 filed under Order-9 Rule-9 of C.P.C., by the 2nd Civil Judge Class-II, Balod, District-Durg (C.G.) in Misc. Civil Suit No.04/2000 was set aside.

2. Brief facts are that in Civil Suit No.04/2000, counsel for the respondent/plaintiff sought an adjournment on 27-03-2000 on the ground of illness of the plaintiff. The learned Lower Court noted that the Civil Suit was pending since 1991 and the plaintiff was not taking any initiative in expeditious disposal. However, considering the reason assigned, it granted an adjournment while directing the plaintiff to remain present on 07-04-2000 to adduce evidence. It was also directed that the application under Order 26 Rule-9 of C.P.C. for demarcation of the suit land (I.A.No.21) would be decided after recording the plaintiff's evidence.

3. On 07-04-2000, the plaintiff was present with counsel Shri J.P.Kannoje and prayed that the application (I.A.No.21) be decided first. The learned lower Court rejected the prayer and directed the plaintiff to begin his evidence. Plaintiff again prayed that his application (I.A.No.21) under Order 26 Rule 9 C.P.C. be disposed of first as he was ready to argue on that application. Rejecting the said prayer, the lower Court directed the plaintiff to begin his evidence. However, the plaintiff declined to do so and stated that he had engaged a new counsel Shri Bhardwaj who was not present and he had filed Vakalatnama of Shri Bhardwaj on the same day i.e. 07-04-2000. The learned lower Court declined to grant an adjournment and passed an order dismissing the suit under Order-17 Rule-2 of C.P.C.

4. The plaintiff preferred an application under Order-9 Rule-9 of C.P.C. for restoration of the suit. The learned Civil Judge Class-II, Balod, District-Durg dismissed the said application on the ground that there was no sufficient cause for the plaintiff for not producing evidence on 07-04-2000. Aggrieved by the said order, the plaintiff/respondent No.1 preferred a Miscellaneous Civil Appeal No.10/2001 in the Court of Additional District Judge, Balod, District-Durg. By the impugned order, this Miscellaneous Civil Appeal was allowed on the ground that the lower Court ought to have decided the application under Order 26 Rule 9 C.P.C. for the demarcation of the suit land before recording evidence of the plaintiff. It was also observed that the Civil Judge, Class-II, Balod ought to have considered the fact that Shri Bharadwaj, a new counsel engaged by the plaintiff was also not present. It also held that since the lower Court had passed an order of dismissal of suit under Order-17 Rule-2 of C.P.C., a lenient view granting another opportunity to the plaintiff to adduce evidence ought to have been taken. Consequently, the order dated 11-09-2001 passed by the

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IInd Civil Judge Class-II, Balod, District Durg in Misc. Civil Suit No.04/2000 was set aside and the Civil Suit No.187-A/1998 was restored with a direction to the lower Court to grant a last opportunity to the plaintiff to adduce evidence. Aggrieved by the said order, the defendants/petitioners have preferred this Civil Revision.

5. Shri Parag Kotecha, learned counsel for the petitioners contended that on 07-04-2000, the learned Civil Judge Class-II, Balod, District-Durg ought to have proceeded under Order-17 Rule-3 of C.P.C. and not under Order-17 Rule-2 of C.P.C. since despite a clear direction given by the Court on 27-03-2000, the plaintiff, though present, had failed to begin his evidence. Reliance was placed on a Full Bench Decision rendered by the High Court of Madhya Pradesh in **Ramarao Marotirao and Others Vs. Shantibai widow of Madhorao and others**[1]. On this premise, it was contended that the impugned order passed by the learned Additional District Judge, Balod, District-Durg was contrary to law and was liable to be set aside. On the other hand, Ms. Puja Shrivastava, learned counsel for the respondent No.1/plaintiff arguing in support of the impugned order contended that since the learned Civil Judge Class-II, Balod, District-Durg had exercised its discretion not to proceed under Order-17 Rule-3 of C.P.C. and to dismiss the suit under Order-17 Rule-2 of C.P.C., the impugned order granting a last and final opportunity to the plaintiff to adduce evidence was in conformity with the principles of natural justice.

6. Having considered rival submissions, I have perused the documents annexed by the petitioner with this Civil Revision. Annexure P/2 is an application filed by the petitioner under Order 9 Rule 9 C.P.C.

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1. **1977-M.P.L.J.- Page Number-364.**

which explicitly shows that there was a serious dispute regarding demarcation of the suit lands in area 9 decimals. A perusal of the order sheet dated 27.03.2000 in Civil Suit No.187-A of 1998 would show that the plaintiff had filed an application under Order 26 Rule 9 C.P.C. for demarcation of the suit land as that would have clinched the issue arising in the Civil Suit. It would also appear that on 07.04.2000 the plaintiff again requested the trial Court that he was prepared to argue on the application. Looking to the nature of the suit, the learned Additional District Judge, Balod was of the opinion that the trial Court ought to have considered the application under Order 26 Rule 9 C.P.C. before proceeding to record evidence since demarcation of the suit land would have assisted the Court in coming to a right conclusion by projecting the factual location of the suit land. It also appears that the plaintiff had filed Vakalatnama of Advocate Shri Bharadwaj on 07.04.2000 for the first time and had also prayed for an adjournment on this ground.

7. It is true that the plaintiff was present with counsel Shri J.P.Kannoje on 07.04.2000 and on an earlier date he was directed by the Court to produce evidence on 07.04.2000. Although the learned Civil Judge Class-II could have proceeded under Order 17 Rule 3 C.P.C., yet it chose to proceed under Order 17 Rule 2 C.P.C. In this view of the matter, the argument advanced by Shri Parag Kotecha, learned counsel for the petitioner that since the trial Court erroneously proceeded under Order 17 Rule 2 C.P.C., the application under Order-9 Rule-9 C.P.C. would not lie is unacceptable. I am fortified in my view by a decision rendered in **Govardhan Badrilal Mahajan and another Vs. Ganesh Balkrishna Deshmukh**[2] . In that case, the suit was dismissed under Order-17 Rule-3 of C.P.C. for default of the appellant even though

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2. 1962-M.P.L.J-Page Number-325

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provisions of Order-17 Rule-2 of C.P.C. were more appropriate. It was held that the Appellate Court could not treat dismissal as one under Order-9, rule-8 read with Order-17, rule-2 of C.P.C. and set it aside under Order-9, rule-9 of C.P.C. It was observed as under:

> "If a Court purports to act under any specific provision of law the decision has to be judged with reference to that provision and the forum which examines the correctness of that decision has also to be determined with reference to that provision. It is what a Court actually does which determines the forum and gives jurisdiction to the appellate or revisional Court and not what it ought to have done. Consequently where a decree has been passed expressly under a specific provision of the Civil Procedure Code, however erroneously, the remedy is as provided by that provision viz. by an appeal or revision. A.I.R. 1954 All. 222, Foll,; A.I.R. 1927 Lah.562 (1), A.I.R. 1923 Pat.223 and A.I.R.-1954 Pepsu 55, Rel."

8. The only point that remains for consideration is whether the learned Additional District Judge erred in allowing the Misc. Civil Appeal No.10 of 2001 and granting one final opportunity to the plaintiff to produce evidence. The learned A.D.J. rightly took into consideration the fact that the application under Order 26 Rule 9 filed by the plaintiff ought to have been considered first since demarcation of the suit land would have clinched the issue involved in the suit. In this view of the matter, the well merited order passed by the learned Additional District Judge, Balod granting a last opportunity to the plaintiff to adduce evidence cannot be faulted with.

9. In the result, this Civil Revision being without merit fails and is accordingly dismissed. The learned Civil Judge, Class-II, Balod is directed to expeditiously dispose of Civil Suit No. 187-A of 1998 preferably within six months from today. The Registry is directed to send a copy of this order to the learned Civil Judge, Class-II, Balod.

Sd/-
Dilip Raosaheb Deshmukh
Judge